

OLD WINE IN BROKEN BOTTLES:

A STATEMENT OF OPPOSITION TO THE NEXT GENERATION TELEVISION MARKETPLACE ACT (U.S. HOUSE HR 3675 AND SENATE S.2008)

The wealth, power, influence, and overall sustainability of a nation is intimately linked with several key aspects of its infrastructure – transportation, energy resources, the quality of its human capital, physical and financial capital, its defense system, and its communication systems. Given the criticality of each of these marketplaces to America’s current Gross Domestic Product of \$15.09 trillion dollars and their centrality to America’s continued growth and national defense, it becomes clear that some degree of deregulation of these vital industries is needed to support the overall economy.

Yet, this is not the primary argument that Representative Steven Scalise (R-LA) and Senator Jim DeMint (R-SC) utilize as the primary rationale for the repeal of key measures of the Communications Act of 1934. More specifically, these sponsors argue that the Next Generation Television Marketplace Act, through its proposed repeal of elements such as must-carry, the compulsory license, retransmission consent, and ownership limitations will, “...ensure that by removing the heavy hand of government, the market is free to operate in a way that continues to benefit consumers and encourage innovation.” (Rep. Scalise). The co-sponsor of the Bill, Senator DeMint, also argues that “we need to stop issuing new regulations and instead, remove and modernize rules written to address the last century’s business and regulatory model.” However, the logic which underlies such arguments is flawed.

The premises that support the need for regulation in the communication industry are clearly outlined in any Economics 101 text. When an industry’s market structure is a perfectly competitive one, no regulations are needed. Perfect competition suggests that there are many, many sellers because barriers to market entry are few. Additionally, consumers have full knowledge and utilize the knowledge to guide their choices. Under such circumstances, prices regulate the behavior of both buyers and sellers and the most efficient equilibriums will then occur after all market adjustments have been made.

Conditions in the communication industry contraindicate these requirements. Despite its digitization, the television industry remains oligopolistic – a market structure with few sellers who hold tremendous market power. The advent of cable and satellite television has elevated the level of oligopolistic power. This is because while the digitalization of television has created many new networks, the distribution of the signal of these networks is determined by a small handful of companies. Moreover, even the establishment of new networks within the world of digitalization is difficult because the high costs – an estimated \$100 million per new network – serves as a barrier to entry. Of even greater concern, digital transmission has led to media melding as all media is being converted to a common digital technology. As a result, a consolidation process has occurred among companies that own not only television but all mass media thereby increasing the level of oligopolistic power held by these companies.

Representative Scalise and Senator DeMint’s proposed Next Generation Television Marketplace Act – HR 3675 and S.2008 – introduces measures that would provide near-infinite power to those

very large melded media entities who already hold and exercise incredible power in determining what networks will be seen, by whom, and under what circumstances.

For example, the Next Generation Television Marketplace Act proposes to make changes in the key sections of the Communications Act of 1934 (47 U.S.C. 151 et seq.) which include those listed in Table 1 below.

Table 1: Changes in the Communications Act Due to Passage of Next Generation Television Marketplace Act

The Next Generation Television Marketplace Act of 2011 will repeal provisions of the Communications Act of 1934 concerning:

• 47 U.S.C. 339- Carriage of distant television stations and significantly viewed signals by satellite carriers;

• 47 U.S.C. 339- Carriage of distant television stations by satellite carriers (the Federal Communications Commission's (FCC) qualified carrier certification process);

47 U.S.C. 341- Carriage of television signals to certain subscribers;

• 47 U.S.C. 342- Process for issuing qualified carrier certification;

• 47 U.S.C. 532- Cable channels for commercial use (the carriage of local commercial television signals and qualified low power stations by cable operators);

47 U.S.C. 534- Carriage of local commercial television signals;

• 47 U.S.C. 612- Syndicated exclusivity (FCC's authority to adopt syndicated exclusivity rules for private home viewing of secondary transmissions by satellite of broadcast station signals); and

• 47 U.S.C. 325- False, fraudulent, or unauthorized transmissions (requirement that cable systems or other multichannel video programming distributors obtain consent to retransmit a broadcasting station signal).

Additionally, the Act repeals and revises provisions concerning:

- the carriage of local television signals by satellite carriers, and

- the regulation of rates and broadcast signal carriage. Makes several existing requirements concerning the carriage of local television broadcast stations applicable only to qualified noncommercial educational television stations.

Repeals federal copyright laws requiring statutory licenses for certain secondary transmissions of distant and local television programming by satellite carriers. Extends exemptions from copyright infringement laws to certain secondary transmissions by cable systems and satellite carriers. Repeals provisions concerning cable system:

- nonsimultaneous transmission infringement, and

- statutory licenses for secondary transmissions. Directs the FCC to repeal related FCC rules and eliminate:

- restrictions on the number of broadcast television stations that a person or entity may own, operate, or control in the same designated market area under the local television multiple ownership rule;
- the radio-television cross-ownership rule; and

- limitations on the direct or indirect ownership, operation, or control of a broadcast television station by a person or entity that owns, operates, or controls a daily newspaper under the daily newspaper cross-ownership rule. Requires that this Act take effect on July 1, 2014, subject to the exception that contracts, understandings, and arrangements related to retransmission consent and the distribution of video programming entered into prior to its enactment be provided for under special transitional provisions.

As the list indicates, the proposed legislation blatantly seeks to transfer even more power to the most powerful business entities in the world of television. For example, in Representative Scalise's own state of Louisiana, an historic number of films and television shows are now being produced. Louisiana's Gross National Product has benefitted from these productions. Yet, Rep. Scalise proposed to literally "rob" these producers of contents of their royalties by eliminating retransmission consents. This will allow pay-TV distributors such as cable and/or satellite distributors to legally pirate the contents of producers whose works are broadcast over-the-air and retransmit these contents to their pay-TV enrollees without paying anything for this inventory. As a network with four affiliates in Louisiana and with 70% original programming, Punch TV would be financially raped by such a practice. However, other networks and the producers who create these contents would also become the victims of such legalized robbery.

This Bill also proposes to create a new form of intellectual imperialism that controls access to what the public knows or believe that they know. Findings by Pew Research (2010) indicate that on a typical day, television remains the most popular platform for news-gathering followed by the internet, newspapers and radio.

The Next Generation Television Marketplace Act proposes to eliminate the "must carry" provision which guarantees the public's access to a broader selection of views and news by requiring that cable and satellite distributors carry the broadcast signals of a representative sample of television stations in each area. In the absence of "must-carry", what Americans see, hear, and believe will be much more controllable by the few oligopolistic "giants" in the television industry. It is interesting to note that when combined with the fact that this law would also eliminate restrictions on the number of broadcast television stations that an individual or business can own in certain areas and remove restrictions on the radio/television, and newspaper cross-ownership, the Bill would literally deliver the minds and beliefs of entire communities to the viewpoints of one individual and/or group of individuals "those who own and control the mass communication for that area. For example, in Senator DeMint's own State of South Carolina, the voters, in general, vote Republican. One of the largest media owners in South Carolina is the National Cable and Telecommunications Association (NCTA). This entity would benefit tremendously from this Bill.

But, by delivering mass media into the hands of NCTA, Senator DeMint himself would no longer have a fair, open forum for communicating with the public should another candidate become the "favored child" of this media giant. By the way, NCTA gave \$22,000 dollars to Senator DeMint's campaign in the year 2012. Another \$44,350 was given to Senator DeMint by lobbyists

who represent but are not employed by NCTA.

Furthermore, Senator DeMint would be unable to make his case to viewers via local commercial television signals and qualified low power stations because his Bill shall have eliminated the right of these stations to be carried by cable channels and satellite carriers. Other aspects of this bill are similarly detrimental to the interest of all Americans except those who already are a part of the current television oligopoly.

Punch TV Network, on behalf of other independent networks, independent producers, and the American viewing public vehemently opposes this legislature. Read it, analyze it, and think on it, and you too, will oppose it.